Public Prosecutor v Mohamad Fairus bin Omar

HIGH COURT (KUALA LUMPUR) — CRIMINAL TRIAL NO 45-15-96
KC VOHRAH J
13 MAY 1997

***Evidence** — Hearsay — Statement made in the course of, or for the purposes of an investigation or enquiry — Interpretation of s 32(1)(i) and (j) of the Evidence Act 1950 — Whether paragraphs should be read disjunctively or conjunctively — Evidence Act 1950 s 32(1)(i) & (j)*

On 22 October 1996, one Asisah Lang Puteh, a Thai national, made a statement to an inspector under s 112 of the Criminal Procedure Code (FMS Cap 6) ('the CPC'). The evidence showed that she could not be found and although a subpoena was issued for her to testify in the case, efforts to serve it on her were futile. The prosecution sought to introduce her statement in evidence under s 32(1)(i) of the Evidence Act 1950 ('the EA 1950') on the ground that she could not be found. Counsel for the accused argued that the statement was inadmissible because the statement was not made by a public officer in the discharge of his duties as was required under s 32(1)(j). The issue before the court was in relation to the interpretation of paras (i) and (j) of s 32 of the EA 1950 and whether the statement was admissible.

Held, ruling that the statement was admissible:

(1) Each of the paragraphs in s 32 of the EA 1950 spelt out a separate set of circumstances where a statement could be made admissible. Since each paragraph could stand on its own, it would do violence to the scheme in the arrangement of the paragraphs to say that paras (a)–(g) were to be interpreted one way and paras (i) and (j) in another. It had to be assumed that the draftsman would follow the linguistic style and the scheme of the paragraphing in s 32 before it was amended when he sought to add the new paragraphs (see p 61 D–E).

(2) Statutory provisions must be construed contextually relying on logic. In s 32 of the EA 1950, the statements became admissible as set out in 10 specific and separate cases where the circumstances were spelt out and they were alphabetically numbered (a) to (j). The word 'and' appearing between paras (i) and (j) was a cumulative, meaning that para (j) was an additional paragraph to the preceding paragraphs, setting out the circumstances under which a statement was admissible, and not a qualifying paragraph to para (i); (see p 61E–G); *Yeong Peng Wah v Bahal Singh* [1961] MLJ 316 followed.

[Bahasa Malaysia summary

Pada 22 Oktober 1996, seorang bernama Asisah Lang Puteh, warganegara Thai, telah membuat suatu pernyataan kepada seorang

inspektor di bawah s 112 Kanun Acara Jenayah (NMB Bab 6) ('KAJ'). Keterangan telah menunjukkan bahawa dia tidak dapat dijumpai dan walaupun satu sepina telah dikeluarkan untuknya supaya memberi keterangan di mahkamah, usaha-usaha untuk menyampaikan sepina tersebut telah gagal. Pihak pendakwa telah cuba mengemukakan pernyataan tersebut di bawah s 32(1)(i) Akta Keterangan 1950 ('AK 1950') atas alasan bahawa dia tidak dapat dijumpai. Peguam bagi pihak tertuduh menghujahkan bahawa pernyataan tersebut tidak boleh diterima masuk kerana ianya tidak dibuat oleh seorang pegawai awam dalam pelaksanaan tugasnya seperti yang dikehendaki oleh s 32(1)(j). Isu di hadapan mahkamah adalah berkenaan dengan tafsiran perenggan-perenggan (i) dan (j) dalam s 32 AK 1950 dan sama ada pernyataan tersebut boleh diterima masuk.

Diputuskan, memerintahkan pernyataan tersebut diterima masuk:

(1) Setiap perenggan di bawah s 32 AK 1950 menjelaskan set keadaan yang berasingan di mana sesuatu pernyataan itu boleh diterima masuk. Oleh kerana setiap perenggan boleh berdiri dengan sendirinya, ianya akan menjejaskan skim dalam susunan perenggan-perenggan untuk menyatakan bahawa perenggan (a)–(g) harus ditafsirkan mengikut suatu cara dan perenggan (i)–(j) dalam cara yang lain. Ianya harus dianggap bahawa penggubal akan mengikut cara bahasa dan skim perenggan s 32 sebelum ianya dipinda ketika dia menambahkan dua perenggan baru itu (lihat ms 61D–E).

(2) Peruntukan-peruntukan statut harus ditafsirkan dalam konteks mengikut lojik. Di bawah s 32 AK 1950, pernyataan-pernyataan tersebut menjadi boleh diterima masuk seperti yang dinyatakan dalam 10 kes yang tertentu dan berasingan di mana keadaan-keadaan disenaraikan dan ianya dinomborkan mengikut abjad (a) sehingga (j). Perkataan 'dan' yang muncul di antara perenggan-perenggan (i) dan (j) adalah satu kata penghubung kumulatif, yang bermakna bahawa perenggan (j) adalah satu perenggan tambahan kepada perenggan-perenggan sebelumnya, yang menyatakan keadaan-keadaan di bawah mana pernyataan tersebut boleh diterima masuk, dan bukannya suatu perenggan kelayakan kepada perenggan (i) (lihat ms 61E–G); *Yeong Peng Wah v Bahal Singh* [1961] MLJ 316 diikut.]

Cases referred to

PP v Michael Anayo Akabogu [1995] 3 MLJ 42 (not folld)
Yeong Peng Wah v Bahal Singh [1961] MLJ 316 (folld)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) ss 107, 112, 113, 119
Evidence Act 1950 ss 32(1)(i), 32(1)(j), 33
Evidence (Amendment) Act 1993

A *Hj Idris bin Othman* (Deputy Public Prosecutor) for the Public Prosecutor. *Bhagwan Singh* (*Bhagwan Singh & Co*) for the accused.

KC Vohrah J: On 22 October 1996 Asisah Lang Puteh, a Thai national, made a statement to Chief Insp Howe under s 112 of the Criminal
B Procedure Code (FMS Cap 6) ('the CPC'). The prosecution sought to introduce her statement in evidence under s 32(1)(i) of the Evidence Act 1950 on the ground that she could not be found.

The evidence does show that she cannot be found. Although a subpoena was issued for her to testify in this case, efforts to serve it on her
C were futile. The father-in-law of the Thai girl who executed a bond for her appearance in the magistrates' court stated that three days after staying in his house after the execution of the bond she left the house. He said that she left Malaysia as she had told him her brother from Thailand had come to fetch her. An article in a Malay language newspaper, *Utusan Malaysia* — with her photograph printed in it — called for her to assist the police
D but there was no response. I am satisfied that she cannot be found. The prosecution said that on that ground and because the statement was made during the course of police investigation the statement should be admitted. Encik Bhagwan said that the statement was inadmissible because it was not made by a public officer in the discharge of his duties as is required under s 32(1)(j) and he relied on *PP v Michael Anayo Akabogu*
E [1995] 3 MLJ 42 as authority.

Before its amendment by Act A851 which came into effect on 16 July 1993, s 32 set out the cases in which statements of relevant facts by a person who is dead or cannot be found or has become incapable of giving evidence or whose attendance cannot be procured without an amount of
F delay or expense are themselves relevant facts. The cases in which such statements become admissible are set out in eight paras, namely (a) to (g). With the amendment, two new paragraphs have been added; namely (i) and (j).

According to the decision in *Akabogu*, the two new paragraphs do not
G set out two new cases but one case where two conditions have to be satisfied before a statement can become admissible. As is put in the case (at p 48), paras (i) and (j) of s 32(1) are conjoined by 'and' between them and 'brought in together', and the intention of the legislature was 'to bind' the two newly-inserted paragraphs.

H With the greatest of respect, I cannot agree.

Sections 32 and 33 are exceptions to the general rule that hearsay evidence is not admissible. In respect of s 32, the circumstances under which a statement becomes admissible are set out in itemized paragraphs. And it will be noticed that for each set of circumstances, if there are criteria or conditions to be fulfilled they are spelt out in the same paragraphs.
I Similarly, it will be noted that each of newly-inserted paras (i) and (j) has the conditions set out. The conditions for the admissibility of a statement under para (i) are that it 'was made in the course of, or for the purposes of, an investigation or inquiry into an offence under or by virtue of any written law'; and for para (j) it must have been 'made by a police officer in the discharge of his duties'.

Section 32 of the Evidence Act 1950 is set out below: A

(1) Statements, written or verbal, of relevant facts made by a person who is dead or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable, are themselves relevant facts in the following cases: B

(a) when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such a statement is relevant whether the person who made it was or was not at the time when it was made under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question; C

(b) when the statement was made by any such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business or in the discharge of professional duty; or of an acknowledgment written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce, written or signed by him, or of the date of a letter or other document usually dated, written or signed by him; D E

(c) when the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages;

(d) when the statement gives the opinion of any such person as to the existence of any public right or custom or matter of public or general interest, of the existence of which if it existed he would have been likely to be aware, and when the statement was made before any controversy as to the right, custom or matter had arisen; F

(e) when the statement relates to the existence of any relationship by blood, marriage or adoption between persons as to whose relationship by blood, marriage or adoption the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised; G

(f) when the statement relates to the existence of any relationship by blood, marriage or adoption between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree or upon any tombstone, family portrait or other thing on which such statements are usually made, and when the statement was made before the question in dispute was raised; H

(g) when the statement is contained in any document which relates to any transaction as is mentioned in s 13(a);

(h) when the statement was made by a number of persons and expressed feelings or impressions on their part relevant to the matter in question; I

A (i) when the statement was made in the course of, or for the purposes of, an investigation or inquiry into an offence under or by virtue of any written law; and

(j) where the statement was made by a public officer in the discharge of his duties.

B (2) The provisions of paras (i) and (j) of sub-s (1) shall apply only in relation to a criminal proceeding.

So far as the CPC is concerned, in respect of para (i) a statement may be made under ss 107, 112 or 113 of the CPC and in respect of para (j) a statement by a police officer may be made under s 119 of the CPC. A C police officer may also make a statement under s 112. Paragraphs (i) and (j) stand separately.

Looked at from the point of view of the various paragraphs enumerated in s 32 before the section was amended, each of the paragraphs can be considered as spelling out a separate set of circumstances where a statement can be made admissible. Each paragraph can stand on its own. So can D each of the two inserted paragraphs. It would do violence to the scheme in the arrangement of the paragraphs to say that paras (a)–(g) are to be interpreted in one way and (i) and (j) differently. It has to be assumed that the draftsman will follow the linguistic style and the scheme of the paragraphing in s 32 before it was amended when he sought to add the E new paragraphs.

I have a third reason. As was pointed out by Ong J (as he then was) in the Court of Appeal case of *Yeong Peng Wah v Bahal Singh* [1961] MLJ 316, statutory provisions must be construed contextually relying on logic. In s 32, the statements become admissible as set out in ten specific and F separate cases where the circumstances are spelt out and they are alphabetically numbered (a) to (j). The word 'and' appearing between paras (i) and (j) is properly a cumulative, meaning that para (j) is an additional paragraph to the preceding paragraphs, setting out the circumstances under which a statement is admissible, and not a qualifying paragraph to para (i).

G I therefore rule that the statement is admissible under s 32(1)(i) of the Evidence Act 1950.

Order accordingly.

Reported by Mariette Peters-Goh

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